

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This document relates to:

Casey v. Ivax Corp., C02-2025

This matter comes before the court on a motion for summary judgment by IVAX Corporation, IVAX Pharmaceuticals, Inc., f/k/a Zenith Goldline Pharmaceuticals, Inc., and Zenith Goldline Shreveport, Inc. (collectively "defendants"). Having considered the parties' briefs filed in support of and opposition to this motion, the court finds and rules as follows.

The only dispute in this motion is whether the court should toll Virginia's two-year statute of limitations - which would otherwise preclude plaintiff's recovery - under Va. Code Ann. § 8.01(D).¹ That statute provides, in relevant part,

When the filing of an action is obstructed by a defendant

¹Plaintiff does not dispute defendants' recital of the relevant facts, or defendants' assertion that Virginia law applies to this case, or that Virginia's two-year limitations period governs - and, absent tolling, precludes - her claims.

ORDER
Page - 1 -

1 dant's . . . (ii) using any other direct or indirect
2 means to obstruct the filing of an action, then the
3 time that such obstruction has continued shall not be
counted as any part of the period within which the
action must be brought.

4 Va. Code Ann. § 8.01(D). Plaintiff argues that her claims fall
5 under this exception, and relies on assertions in her complaint
6 that defendants:

7 conspired and/or acted in concert to delay the removal
8 of the preparations containing PPA from the market
place . . . by, *inter alia*, suppressing or concealing
9 knowledge of the grave dangers from the consuming
public and others and/or suppressing the publication of
articles by scientists who held views and opinions that
10 were adverse to defendants' interests.

11 Casey Complaint, ¶ 25. The complaint also alleges that "[w]ell
12 before November, 2000, Pharmaceutical Defendants had actual
13 knowledge that PPA made its product unreasonably dangerous." *Id.*
14 at 35.

15 In support of plaintiff's proposition that defendants'
16 alleged fraudulent concealment triggers a tolling of the limita-
17 tions period in this case, plaintiff string-cites a number of
18 Virginia cases that analyze the tolling statute. Plaintiff
19 asserts that a "recitation of the particular facts and circum-
20 stances of the Virginia cases as they apply to the instant case
21 is not necessary [] given the highly deferential Summary Judgment
22 standard of review conferred upon Plaintiff." Plaintiff's Brief
23 at 7.

24 Plaintiff overstates the degree of deference afforded her.
25 Defendants' motion shifts the burden to plaintiff to submit
26 evidence supporting each element of her claim. *Celotex Corp. v.*

ORDER

Page - 2 -

1 *Catrett*, 477 U.S. 317, 325 (1986). Plaintiff has failed to
2 produce any evidence whatsoever in response to defendants' motion
3 for summary judgment, merely reasserting the allegations in her
4 complaint. This response is grossly insufficient. The summary
5 judgment rule itself provides "[w]hen a motion for summary
6 judgment is made and supported as provided in this rule, an
7 adverse party may not rest upon the mere allegations or denials
8 of the adverse party's pleading, but the adverse party's re-
9 sponse, by affidavits or as otherwise provided in this rule, must
10 set forth specific facts showing that there is a genuine issue
11 for trial. If the adverse party does not so respond, summary
12 judgment, if appropriate, shall be entered against the adverse
13 party." Fed. R. Civ. P. 56(e) (emphasis added). For this reason
14 alone, defendants' motion should be granted.

15 Even if plaintiff had adduced evidence supporting her
16 allegations, however, Virginia courts have routinely interpreted
17 the tolling statute narrowly, holding that "[c]onstructive fraud
18 is not such as will toll the running of the statute of limita-
19 tions A defendant must intend to conceal the discovery of
20 the cause of action by trick or artifice and must have thus
21 actually concealed it from the plaintiff in order for the excep-
22 tion to apply." *Mid-Atlantic Business Communications, Inc. v.*
23 *Virginia Dept. of Motor Vehicles*, 606 S.E.2d 835, 839 (Va.
24 2005)(citations omitted). More, "[t]he character of fraud neces-
25 sary to toll the statute must be of a variety involving moral
26 turpitude." *Resolution Trust Corp. v. Walde*, 856 F.Supp. 281,

ORDER

Page - 3 -

1 286 (E.D. Va. 1994)(citations omitted). According to the law, a
2 plaintiff must prove the element of intent not by a mere prepon-
3 derance, but by clear and convincing evidence. *Id.*

4 Plaintiff's allegations - even if supported - would fail to
5 meet this narrow standard. Plaintiff alleges only that defendants
6 acted to delay the removal of the PPA-containing products from
7 the market. Nowhere in her complaint does she allege an intent to
8 conceal the cause of action. The materiality of the distinction
9 between the two allegations is emphasized by the court in *Resolu-*
10 *tion Trust Corp. v. Walde*, which found that the defendants had
11 "made the decisions for compelling business reasons wholly
12 unrelated" to plaintiff's claims. 856 F.Supp. at 286.

13 For the foregoing reasons, the court finds that plaintiff
14 has failed to establish a genuine issue of material fact for
15 trial, and that defendants are entitled to judgment as a matter
16 of law. Defendants' motion for summary judgment is therefore
17 GRANTED. This case is hereby dismissed.

18 DATED at Seattle, Washington this 11th day of May, 2005.
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21 BARBARA JACOBS ROTHSTEIN
22 UNITED STATES DISTRICT JUDGE
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